

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA**

TANGELA DAVIS BOSTON,

Plaintiffs,

v.

**THE HARTFORD INSURANCE
COMPANY,**

Defendants.

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CIVIL ACTION NO.

1:07-CV-663-MEF

**DEFENDANT'S REPLY TO PLAINTIFF'S
BRIEF IN RESPONSE TO MOTION TO DISMISS**

Defendant, Property and Casualty Insurance Company of Hartford ("P&C") (incorrectly identified as "The Hartford Insurance Company" in the Complaint), files this Reply to Plaintiff's Brief in Response to P&C's Motion to Dismiss Plaintiff.

INTRODUCTION

In response to P&C's properly supported Motion to Dismiss, Plaintiff has conceded that she is not alleging a claim of bad faith. The Plaintiff has unequivocally admitted that she is only seeking under-insured motorist benefits in this matter. Therefore, Florida law, which governs this dispute, requires the dismissal of Plaintiff's claim for punitive damages because punitive damages are not recoverable on such a claim.

In the event the Court construes the Complaint as asserting a claim for bad faith, those claims must also be dismissed because: (1) those claims are absolutely barred by Florida Statute §624.155 because Plaintiff failed to file the required statutory notice of the claim with the Florida Department of Insurance and (2) Plaintiff's claims for bad faith and any breach of contract are premature.

ARGUMENT

I. The Plaintiff has Conceded that the Complaint Does Not Contain a Claim for Bad Faith.

Plaintiff admitted in the Brief in Response to P&C's Motion to Dismiss that she is not alleging a claim for bad faith against P&C. In fact the Plaintiff averred: "Plaintiff's Complaint makes no claim for statutory bad faith." Reply Brief at ¶14. In addition, the Plaintiff stated: "Plaintiff admits that the Complaint fails to state a claim for statutory bad faith and for common law bad faith as it was not Plaintiff's intent to make either claim." *Id.* at ¶18. Plaintiff's reply brief makes it clear that she is only seeking under-insured motorist benefits. Therefore, it should be ordered that Plaintiff is not alleging a bad faith claim against P&C. In addition, the allegations in the Complaint which aver "Defendant Hartford denied said claim or failed to seasonably act on said claim," must be stricken because these facts would tend to create an inference that the Plaintiff is seeking a claim for bad faith. In addition, these allegations should be stricken because they are inflammatory and irrelevant to the Plaintiff's claims for under-insured benefits.

II. Florida Law Governs Plaintiff's Claims.

Plaintiff argues that Alabama law governs the Plaintiff's claim for under-insured motorist benefits. Florida law is applicable here, however, because the policy at issue was delivered to Francis Davis, the policy owner, in Florida and is a Florida policy. Plaintiff does not dispute these facts. Also, the policy states that the vehicle Plaintiff was driving at the time of the accident was garaged in Florida. *See* Exhibit 1 at p. 1

Under Alabama conflict of laws principles, Florida law governs Plaintiff's claims for under-insured motorist benefits under the policy. *See State Farm Mut. Auto. Ins. Co. v. Bradley*, 293 Ala. 695, 696, 309 So. 2d 826, 827 (Ala. 1975) (holding that where the policy was issued in

South Carolina and the cars covered by the policy were garaged in South Carolina, the court would apply South Carolina law). In *Davis v. Hartford Ins. Co.*, 456 So. 2d 302, 304 (Ala.1984), the Alabama Court held that Illinois law should apply with regard to an insurance contract where the contract "was made within the State of Illinois between an Illinois company and an Illinois resident," even though the accident at issue occurred in Alabama. *See also Cotton v. State Farm Mut. Auto. Ins. Co.*, 540 So. 2d 1387, 1388 (Ala. 1989); *American Interstate Ins. Co. of Georgia v. Holliday*, 376 So. 2d 701 (Ala.1979); *State Farm Mutual Automobile Ins. Co. v. Bradley*, 309 So. 2d 826 (1975). These cases are aligned with the "traditional conflict rule of *lex loci contractus*, which states that the laws of the jurisdiction where the contract is made governs the contract." *Travelers Property Cas. Co. of America v. OneSource Facility Services, Inc.*, 2006 WL 752925, *2, No. 3:05 CV 00618 WKW. (M.D. Ala. March 23, 2006). Thus, Plaintiff's attempt to confuse the issues by arguing that Alabama law applies must be ignored. This Court should apply Florida law and dismiss any and all claims for punitive damages as discussed below.

II. Plaintiff Cannot Recover Punitive Damages.

As stated above, Plaintiff has conceded that she has not asserted a claim for bad faith and is only asserting a claim for under-insured benefits under the applicable policy. Plaintiff wrongfully argues that she is allowed to recover punitive damages under Alabama law. As is demonstrated above, Florida law applies to determine the scope of benefits Plaintiff is entitled to recover and Florida law dictates that Plaintiff cannot recover punitive damages on a claim for under-insured motorist benefits. *See Suarez v. Aguiar*, 351 So. 2d 1086 (Fla. Dist. Ct. App. 1977) (holding: "the uninsured motorist coverage in the State of Florida does not include liability for punitive damages."); *see also Holton v. McCutcheon*, 584 So. 2d 50, 51 (Fla. Dist. Ct. App.

1991); *Adams v. Fidelity Cas. Co. of New York*, 920 F. 2d 897 (11th Cir. 1991) (citing *Suarez* with approval). Therefore, Plaintiff cannot as a matter of law recover punitive damages and any such claims should be dismissed. Further, the language in the Complaint which purports to allege facts supporting a claim for punitive damages must be stricken from the Complaint.

III. Alternatively, if The Court Determines that the Plaintiff has Asserted a Claim for Bad Faith Those Claims Must be Dismissed.

A. If the Court determines that the Plaintiff asserted a Bad Faith Claim, such a claim is barred by FSA §624.155.

If the Court determines that Plaintiff *did* assert a claim for bad faith in the Complaint it cannot be disputed that those claims are barred by Florida Statute §624.155. Plaintiff has not disputed that she failed to comply with F.S.A. §624.155 (3) (a) which requires: "As a **condition precedent** to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation." F.S.A. §624.155 (3) (a) (emphasis added). The Plaintiff's failure to comply with this condition precedent absolutely bars her claims for bad faith against P&C. *Allstate Ins. Co. v. Clohessy*, 32 F. Supp. 2d 1328, 1333 (M.D. Fla. 1998) (holding that "due to the failure of the defendants/counter-plaintiffs to comply with the specified condition precedent, *i.e.*, the failure to file notice with the Florida Department of Insurance, it is imperative that this Court dismiss the defendant/counter-plaintiffs' [claim for bad faith]."); *see also Commercial Union Ins. Co. v. Flagship Marine Services, Inc.*, 982 F. Supp. 310 (S.D.N.Y 1997).

B. If the Court Holds that Plaintiff Asserted a Claim for Bad Faith, Such Claim is Premature and Should be Dismissed without Prejudice.

Any claims for bad faith the Court determines are alleged in the Complaint should be dismissed because Plaintiff cannot prove at this juncture: (1) the existence of liability and (2) the extent of damages. *See Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000); *Vanguard Fire*

and *Cas. Co. v. Golmon*, 955 So. 2d 591, 594 (Fla. Dist. Ct. App. 2006). Further, "absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for [] bad faith." *Blanchard v. State Farm Mut. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991). Therefore, if the Court determines that the Complaint alleges a claim of bad faith, that claim is premature and due to be dismissed. *Progressive Select Ins. Co. v. Shockley*, 951 So. 2d 20 (Fla. Dist. Ct. App. 2007).

CONCLUSION

The Plaintiff has unequivocally admitted that she did not assert a claim for bad faith and is instead merely seeking under-insured motorist benefits. Therefore, Plaintiff cannot recover punitive damages, as a matter of Florida law, and any such claims should be dismissed. Further, any allegations in the Complaint that purport to support a claim for punitive damage should be dismissed.

Alternatively, if the Court reads the Complaint as alleging a bad faith claim, P&C is also entitled to have those claims dismissed. P&C demonstrated that the claims should be dismissed because: (1) a bad faith claim is barred because Plaintiff failed to comply with the condition precedent to bringing a bad faith claim contained in FSA §624.155 and (2) a claim for bad faith is not ripe for adjudication because the Plaintiff cannot prove the existence of liability and the extent of her damages.

Respectfully submitted this the 15th day of August, 2007.

/s/ Meredith Jowers Lees
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CERTIFICATE OF SERVICE

I certify that on August 15, 2007, a copy of the foregoing was served in the manner indicated below on the following counsel of record:

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- ☐ by Hand Delivery
- ☐ by U.S. mail properly addressed and postage pre-paid
- ☐ by facsimile transmission
- ☒ by PACER electronic filing

/s/ Meredith Jowers Lees

Of Counsel

EXHIBIT - 1

POL #55PHH964253 PROD 334108 REQ CD ROM RE R

INSD DAVIS, FRANCES POLICY PROCESS DT 010405
 ADDR P O BOX 71 RATE TABLE DT 110204
 CITY CHIPLEY ST FL ZIP 32428-0071 HBB
 POL TERR 075 COUNTY OVRD ZIP -

POL NC PAY HCC RATE
 SUB SHT CO PLAN ST EFF EXP TERM INST PF RNST A/C RI STAT LAPSE IND PLAN
 DAV P 1 FL 021905 021906 12 1 A 2000

---TABS--- BILL PHSE ORIG RNL CHG TRANS AARP
 ACCT NO PLAN METH CD POL DT TX CD CDT ACT CH# EFF DT DT PROC MEMB
 84012734 MO 1 01 021904 9000 CHG 01 052105 062405 Y

LTERM PCANCCDE STATE EXCEPTION N RSN REAPP
 CR MVR CRT HO POL #/FORM COMPANION POL# POL U/W CRU CLUE PC BKT#
 C S 8509

PREVIOUS: POL # PROD CO POL PLAN STATE RET COM CR ST BOOKLET
 55PHH964253 334108 P FL N

FUTURE: POL # PROD SUB CO POL PLAN ACCT NO PLAN METH
 NR CODE P/L QUAL CODE

AUTO 1 GARAGE 718 ORANGE SCHIPLEY ST FL ZIP 32428-2148 OVRD ZIP
 AUTO GARAGE ST ZIP OVRD ZIP

POL PKG ENH CD: HOMESHP DWG CD: RES OCCPY YR CNT:

SCORE REASON CODES: NO HIT ORDER DATE: 02/04MODEL: V
 INET CR IND N MTR CLB CR N ADV ISS N

--- LOSS PAYEE/LESSOR INFO ---

**** NO LOSS PAYEE INFO FOR THIS POLICY ****

----- AUTO INFO -----

AUTO VIN DT N PURCH MAKE
 # YR MAKE MDL/BODY VIN VER PRCH U PRICE TYPE CD
 1 98 TOYOT CAMRY CE/LE/XLE JT2BG22K0W0142476 A PP 62

AUTO RATE DAYS/MILE CAR VIN L PD DDC IPO GS FZN
 # TERR CLASS WEEK/WORK POOL USE SYM BYP PERF P SUR CR LSR SUR CR AGE
 1 075 C262AJ P E N

AUTO ANTI SEAT AIR FULL ANN FUTUR -PREVIOUS-- --CURRENT-- INSP
 # THFT BELT BAG ABS DRL GLASS MLGE MLGE ODM DATE ODM DATE INFO
 1 A B B 10000 049000 1099 091000 0204

AUTO MTHM MTHM/TRLR MTHM RV RV ROUND 4 RSA PS HAZ ENGCC MCYCLE
 # LGTH RESID LAYUP ASSOC APPLD MODIFIER APPLD EXCL SIZE DRVR
 1 N

AUTO# BI/PD SYM MED/PIP/UM SYM
 1

----- DRIVER INFO -----

NAME DOB MS SEX OCC LIC # DT LIC
 1 DAVIS, FRANCES 111142 W F LPN D120247429110 FL 111158

-STATE SPECIFIC-

DRV P % L D G DEF ADV SCH MCYCLE AGE DVR RET 3YR MVR MVR
 CAR O USE D T S DRV DT DDC 100+ DDC DT INC PTS CR MVR CD AGE IPO ACC CONV SPD
 1 X 0 Y 1

DRIV OVER 5 = YR PT FR = TOT SDI = # ACC = # CONV = INEXP PO =
 IFC = SDP = AVD = FR-SUR = FR-NC = SPEED =

DRIVER EXT EXT NON PREMIUMS
 # NON BI PD MED
 1

I AD+D AD+D PREM O/R
 II III IV I+II III+IV VEHS
 1

----- TIERING INFO -----

NO INC INCEPT CAPPED SCORE MODEL: V SS# IND: N
 VEH# TIER TIER TIER TIER INSUR SCORE: W7
 1 A2
 2
 3
 4

----- SDIP INFO -----

YEARS --INCIDENT COUNTS AND AGE IN MONTHS (3 YEAR STATE)--
 DVR DRV CLEAN MAJ-CNV MIN-CNV AF-ACC NCAF-ACC NAF-ACC
 # VEH (0-5) CNT AGE CNT AGE CNT AGE CNT AGE CNT AGE
 1 1 5 0 00 0 00 0 00 0 00 0 00
 2
 3
 4
 5

YRS INCID FREE: 00
 LONG INCID: 00

----- COVERAGES -----

LIMITS		PREMIUMS BY AUTO			
		1	2	3	4
BI	25/ 50	\$ 104.00	\$	\$	\$
PD	25	\$ 69.00	\$	\$	\$
PAS HAZ		\$	\$	\$	\$
MED		\$	\$	\$	\$
UM	* 25/ 50	\$ 55.00	\$	\$	\$
ADDTL CHG INC LIMITS		\$ 26.00	\$	\$	\$

• - (UM LIMITS ARE STACKED)

PDBUYBACK

NO FAULT FL FULL INS/HH; WKLS XT PIP

		PREMIUMS BY AUTO			
		1	2	3	4
PIP		\$ 97.00	\$	\$	\$
ADD PIP					

INC FMLY #
 (BPP PIP 1 DPD ----- FOR SYSTEMS USE)

	LIMITS BY AUTO					PREMIUMS BY AUTO			
	1	2	3	4		1	2	3	4
NON COLL	500				\$	35.00	\$		\$
COLL	500				\$	114.00	\$		\$
STATED									
AMOUNT									
CUSTOMIZED									
NON COLL									
COLL					\$		\$		\$
STA AMT									
LOAN/LEASE COV COMP					\$		\$		\$
LOAN/LEASE COV COLL					\$		\$		\$
NAC N									

PGM ELIG =ZFORGV =ZEARN DIS DED 0

NCRF LOSS RECOUP/ALLOC
 NCRF CLEAN RISK RECOUP/ALLOC

	LIMITS BY AUTO					PREMIUMS BY AUTO			
	1	2	3	4		1	2	3	4
T & L	050				\$	6.00	\$		\$
EXCESS SOUND					\$		\$		\$
AUDIO/VISUAL					\$		\$		\$
TAPES ONLY					\$		\$		\$
TRANSP EXP	020				\$	INCL	\$		\$
CPL COV					\$		\$		\$
SPEC PERIL					\$		\$		\$
TOTAL PREMIUM BY AUTO					\$	506.00	\$		\$

PERSONAL UMBRELLA

OTHER ENDT PREMIUM \$ 367.00-

FULL TERM PREMIUM \$ 506.00 PROPOSED HOMEOWNER ACCT CR \$ 35.00

----- ENDORSEMENTS -----

ENDT A4506 0 A4832 1 A5750 1 A5884 1 A5579 2 A5906 0